

—Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**Edward Simon's Comments on Petition for Waiver of the Commission's Rule on  
Opt-Out Notices on Fax Advertisements Filed by  
"RadNet Entities"**

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### **Executive Summary**

On October 30, 2014, the Commission granted “retroactive waivers” of 47 C.F.R. § 64.1200(a)(4)(iv) to defendants in private TCPA litigation and allowed “similarly situated” persons to seek waivers (“Opt-Out Order”). The Commission ruled that “all future waiver requests will be adjudicated on a case-by-case basis” and did not “prejudge the outcome of future waiver requests.” The Commission specifically refused to grant blanket future waivers and indicated that only “some” parties will qualify for waivers.

The Commission should deny the petition for waiver brought by the “RadNet Entities” (22 entities listed on Ex. A to the Petition) (collectively “RadNet Entities,” or individually “RadNet Entity”) for each of the following reasons:

*First*, the Commission has no authority to “waive” violations of any regulations “prescribed under” the TCPA in a private right of action.<sup>1</sup> Doing so would violate the separation of powers by dictating a “rule of decision” to the courts, which have exclusive power to determine whether a violation of the regulations has taken place, and by abrogating Congress’s determination that “each such violation” automatically gives rise to \$500 in minimum statutory damages.<sup>2</sup>

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<sup>1</sup> *Natural Res. Def. Council v. EPA*, 749 F.3d 1055, 1062 (D.C. Cir. 2014) (holding federal agency lacked authority to create affirmative defense to its own regulations in statutory private right of action).

<sup>2</sup> *United States v. Klein*, 80 U.S. 128, 147–48 (1872); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630 at \*14 (W.D. Mich. Dec. 12, 2014).

*Second*, the RadNet Entities are not “similarly situated” to the petitioners to whom waivers were granted in the Opt-Out Order, in at least the following respects: (1) the RadNet Entities do not identify which of them, if any, sent faxes that are subject to the request for waiver; (2) of the 22 RadNet Entities listed on Exhibit A to the Petition, only three are defendants in the litigation brought by Edward Simon (“Simon”)<sup>3</sup> and therefore the 19 other entities are not subject to “potentially substantial damages.” The three entities that are defendants in the Simon litigation have also failed to show that they are subject to “potentially substantial damages;” (3) none of the RadNet Entities claim or can maintain, consistent with the TCPA and Commission rules, that they sent fax ads to Simon or any other recipient with their prior express permission; and (4) while the RadNet Entities make assertions about their “belief” and “understandings” about the need to comply with § 64.1200(a)(4)(iv), the assertions are devoid of any substance and are meaningless conclusions that should be disregarded by the Commission. A party seeking something as serious as a waiver from liability must do more than make naked and empty claims.

*Third*, the RadNet Entities assert that they sent faxes “to health care providers with whom [they have] done and [are] doing business” and invoke the “established business relationship” exemption under the TCPA. They were therefore obligated to provide opt-

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<sup>3</sup> Simon is the named plaintiff and proposed class representative in class action litigation pending in the United States District Court for the Central District of California against the following “RadNet Entities”: Radnet Management, Inc., Beverly Radiology Medical Group and Breastlink Medical Group, Inc. (*Edward Simon, DC v. RadNet Management, Inc., et al.*, No. 2:14-cv-7997 BRO (filed September 4, 2014))

out notices on their faxes regardless of any purported prior express permission—but there are no opt-out notices on their faxes. As recognized by the Commission in the Opt-Out Order, no waiver is to be granted in connection with “fax ads sent pursuant to an established business relationship.” It would be against public interest to waive the RadNet Entities’ liability under § 64.1200(a)(4)(iv) in connection with their failure to provide opt-out notices because opt-out notices were required on their faxes in all events.

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Simon is the named plaintiff and proposed class representative in a private TCPA action pending in the United States District Court for the Central District of California brought against three of the 22 RadNet Entities listed on Exhibit A to the Petition.<sup>1</sup> The RadNet Entities seek a "retroactive waiver" of § 64.1200(a)(4)(iv), which requires opt-out notices on fax advertisements sent with "prior express invitation or permission."<sup>2</sup> If successful, the RadNet Entities intend to present the waiver to the District Court, asking it to bar any claims based on violations of the regulation. On January 30, 2015, the Consumer and Governmental Affairs Bureau sought comments on RadNet Entities' Petition by February 13, 2015.<sup>3</sup>

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<sup>1</sup> Case No. 2:14-cv-7997 BRO. The three "RadNet Defendants" are: Radnet Management, Inc., Beverly Radiology Medical Group and Breastlink Medical Group, Inc.

<sup>2</sup> See *Petition for Waiver*, CG Docket Nos. 02-278 and 05-338 (filed January 16, 2015).

<sup>3</sup> *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions For Waiver of the Commission's Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338

*Footnote continued on next page*

### **The Commission's October 30 "Opt-Out Order"**

On October 30, 2014, the Commission issued the "Opt-Out Order,"<sup>4</sup> granting "retroactive waivers" intended to relieve the covered TCPA defendants of liability in private TCPA actions for past violations of § 64.1200(a)(4)(iv), which requires opt-out notices on fax ads sent to recipients who provided prior expression permission. The Opt-Out Order does not grant any waiver for or otherwise affect fax ads sent *without* prior express permission. The Commission "emphasize[d] that this waiver does not affect the prohibition against sending unsolicited fax ads, which has remained in effect since its original effective date."<sup>5</sup>

The Opt-Out Order also allows "similarly situated" parties to petition for similar waivers.<sup>6</sup> The Commission ruled that "all future waiver requests will be adjudicated on a case-by-case basis" and did not "prejudge the outcome of future waiver requests."<sup>7</sup> The

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*Footnote continued from previous page*  
(Jan. 30, 2015).

<sup>4</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014).

<sup>5</sup> Opt-Out Order ¶ 31.

<sup>6</sup> *E.g.*, Opt-Out Order ¶ 5.

<sup>7</sup> *Id.* ¶ 30, n. 102.



Commission specifically refused to grant blanket future waivers<sup>8</sup> and indicated that only “some” parties would be granted waivers.<sup>9</sup>

Before it addressed waivers in the Opt-Out Order, the Commission ruled that its adoption of § 64.1200(a)(4)(iv) was a valid exercise of Congressional authority granted under 47 U.S.C. § 227(b).<sup>10</sup> Further, the Commission found that requiring opt-out notices on fax ads sent to recipients who give prior express permission serves highly useful and important purposes: “absent [such] a requirement...recipients could be confronted with a practical inability to make senders aware that their consent is revoked. At best, this could require such consumers to take, potentially, considerable time and effort to determine how to properly opt out...At worse, it would effectively lock in their consent. Moreover...giving consumers a cost-free, simple way to withdraw previous consent is good policy.”<sup>11</sup>

The Commission also ruled that the “similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship” was completely

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<sup>8</sup> *Id.* ¶ 13.

<sup>9</sup> *Id.* ¶ 1.

<sup>10</sup> Opt-Out Order ¶ 14. Unless as expressly noted, all statutory references herein to “§ 227” are to 47 U.S.C. § 227 and all Commission references herein to “§ 64.1200” are to 47 C.F.R. § 64.1200.

<sup>11</sup> *Id.* ¶ 20.

unaffected by the Opt-Out Order and continues to be mandatory under the TCPA and Commission rules and regulations.<sup>12</sup>

After making these rulings, the Commission found that “good cause exists to grant a retroactive waiver” to the petitioners covered by the Opt-Out Order, observing that “good cause” is shown if “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”<sup>13</sup> With respect to the petitioners covered by the Opt-Out Order, the Commission found that “special circumstances” existed because of the “confusion” caused by footnote 154 in the Commission’s 2006 Junk Fax Order, 21 FCC Rcd. at 3810.<sup>14</sup> In that regard, the Commission specifically noted that “all petitioners make reference to the confusing footnote language in the record.”<sup>15</sup> The Commission also found that covered petitioners could have had “misplaced confidence,” because of the manner of rulemaking, that § 64.1200(a)(4)(iv) did not potentially apply to recipients who had given prior express permission.<sup>16</sup> But the Commission emphasized that “simple

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<sup>12</sup> Opt-Out Order ¶ 2, n. 2, ¶ 28, n.99.

<sup>13</sup> Opt-Out Order ¶¶ 22-23.

<sup>14</sup> *Id.* ¶ 24.

<sup>15</sup> *Id.*

<sup>16</sup> Opt-Out Order ¶¶ 26-27.

ignorance of the TCPA or the Commission's attendant regulations is not grounds for waiver."<sup>17</sup>

The Commission also found that "granting a retroactive waiver would serve the public interest, citing the showings made by covered petitioners that they were subject to "potentially substantial damages" for having violated § 64.1200(a)(4)(iv).<sup>18</sup>

### **The Simon Litigation**

#### **I. Simon's Complaint**

On September 4, 2014, Simon commenced an action in Los Angeles Superior Court against the "RadNet Defendants," and others for sending fax ads in direct violation of the TCPA and the Commission's regulations.<sup>19</sup> Simon avers that the RadNet Defendants, and the other defendants, violated the TCPA in two independent ways: (1) by failing to obtain prior express permission from targeted recipients to send their fax ads; and (2) by failing to include an opt-out notice, required by the Act and the Commission's regulations,<sup>20</sup> advising recipients of their right to stop future fax ads and

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<sup>17</sup> *Id.* ¶ 26.

<sup>18</sup> Opt-Out Order ¶ 27, citing, among others, the Best Buy petition at 5 stating that "Best Buy is now facing a putative class action lawsuit, alleging millions of damages, a claim for which it has no insurance coverage and no ability to pay." *See id.*, ¶ 28, n.98.

<sup>19</sup> Defendants subsequently removed the action to the United States District Court for the Central District of California. *See* 2:14-cv-7997, Docket Entry 1.

<sup>20</sup> § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2); 47 C.F.R. § 64.1200(a)(4)(iii)-(vi). In other words, Defendants' alleged violations of the opt-out notice requirements are not limited to violations of § 64.1200(a)(4)(iv); they also include violations of § 64.1200(a)(4)(iii) with respect to faxes sent with established business relationships.

informing them how to make a valid opt-out request.<sup>21</sup> Simon specifically avers that he did not give prior express permission to the RadNet Defendants, or any other defendant, to send fax ads to him.<sup>22</sup>

Simon seeks to represent a class of all persons to whom the defendants sent junk faxes commencing within the four years preceding the filing, *i.e.*, since September 4, 2010.<sup>23</sup> Simon requests, on behalf of himself and the putative class, statutory damages and an injunction to enjoin future junk faxes by the defendants.<sup>24</sup>

Simon attaches, as Exhibit 1 to his complaint, a copy of a fax ad sent via facsimile transmission to him on August 14, 2014.<sup>25</sup> There is no opt-out notice whatsoever contained on the August 14 fax.

On January 14, 2015, the Court denied the defendants' motion to dismiss, in which they claimed that the August 14 fax was not an "advertisement" under the TCPA.<sup>26</sup> Two days later, the Radnet Entities filed the instant Petition.

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<sup>21</sup> See Declaration of Scott Z. Zimmermann ("Zimmermann Decl."), Ex. A (Simon Complaint) ¶¶ 19, 24

<sup>22</sup> *Id.* ¶ 19.

<sup>23</sup> *Id.* at ¶ 21.

<sup>24</sup> *Id.* ¶¶ 30-31 and Prayer for Relief.

<sup>25</sup> Zimmermann Decl., Ex. A (Ex. 1 thereto).

<sup>26</sup> 2:14-cv-7997, Docket Entry 15.

## II. RadNet Entities' Petition for Waiver

The RadNet Entities' Petition does not identify which of them, if any, sent any faxes that are the subject of the request for waiver. Of the 22 RadNet Entities listed in the Petition only three are defendants in the Simon litigation.

The RadNet Entities do not claim that they obtained any “prior express permission,” as used in the TCPA and Commission rules, to send fax advertisements. At most, the RadNet Entities state, without support, that “[m]any of these health care professionals have specifically requested to receive such information in this manner [via fax].”<sup>27</sup> Notably absent is any statement that “such information” means advertisements, such as the August 14 fax received by Simon. Likewise, the RadNet Entities claim only that Simon sent some unspecified RadNet Entity a “prescription form” on which Simon “requested that the [MRI] scans results be sent to him by fax.”<sup>28</sup>

At most, the RadNet Entities claim the “established business relationship” exemption: “From time to time, RadNet provides information about its services via fax to health care providers with whom it has done and is doing business....All fax numbers used by RadNet were provided by the healthcare provider who received the fax.”<sup>29</sup>

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<sup>27</sup> Petition 3.

<sup>28</sup> *Id.* 3. Simon disputes these allegations. Neither he nor anyone under his employ completed or sent the prescription form.

<sup>29</sup> *Id.* 3. *See also* the RadNet Defendants' Answer in the Simon litigation asserting that “any person receiving a fax from any of them had an established business relationship.” Zimmermann Decl., Ex. B (Answer), 4:2-3.

The RadNet Entities baldly claim that “RadNet did not believe that these solicited fax transmissions required opt-out notices.”<sup>30</sup> The RadNet Entities later claim without support that “RadNet was confused by conflicting language from the *2006 Junk Order*” and that “RadNet reasonably believed that its transmission of solicited faxes was in compliance with the TCPA and Commission regulations.”<sup>31</sup>

The RadNet Entities do not state whether they intend to comply with § 64.1200(a)(4)(iv) or any other opt-out notice requirement in the future, or whether they have implemented any procedures to ensure compliance going forward.

### **Argument**

**I. The Commission does not have the authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action, and doing so would violate the separation of powers.**

**A. The Commission has no authority to “waive” its regulations in a private right of action.**

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”<sup>32</sup> and directs the Commission to “prescribe regulations” to be enforced in

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<sup>30</sup> *Id.* 3.

<sup>31</sup> Petition 5.

<sup>32</sup> § 227(b)(3).

those lawsuits.<sup>33</sup> The “appropriate court” then determines whether “a violation” has taken place.<sup>34</sup> If the court finds “a violation,” the TCPA automatically awards a minimum \$500 in statutory damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds the violations were “willful[] or knowing[].”<sup>35</sup>

The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.<sup>36</sup>

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.<sup>37</sup> It does not authorize the Commission to intervene in a private right of action.<sup>38</sup> It does not require a private plaintiff to notify the Commission that it

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<sup>33</sup> § 227(b)(2).

<sup>34</sup> § 227(b)(3)(A)–(B).

<sup>35</sup> § 227(b)(3).

<sup>36</sup> § 227(b)(3).

<sup>37</sup> *Id.* 47 C.F.R. § 1.3 does not provide this authority at all, and certainly not on a retroactive basis.

<sup>38</sup> *Id.*

has filed a private lawsuit.<sup>39</sup> Nor does it limit a private plaintiff's right to sue for violations in situations where the Commission declines to prosecute.<sup>40</sup>

The Communications Act does, however, grant the Commission authority to enforce the TCPA through administrative forfeiture actions.<sup>41</sup> Private citizens have no role in that process.<sup>42</sup> Thus, the TCPA and the Communications Act create a dual-enforcement scheme in which the Commission promulgates regulations that both the Commission and private litigants may enforce, but where the Commission plays no role in the private litigation and private citizens play no role in agency enforcement actions.<sup>43</sup> This is not an unusual scheme. The TCPA is similar to several statutes, including the Clean Air Act, which empowers the EPA to issue regulations imposing emissions standards<sup>44</sup> that are enforceable both in private "citizen suits"<sup>45</sup> and in administrative actions.<sup>46</sup>

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<sup>39</sup> *Id.*; *Cf.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

<sup>40</sup> *Cf.*, *e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain "right-to-sue" letter from Equal Employment Opportunity Commission).

<sup>41</sup> *Id.* § 503(b).

<sup>42</sup> *Id.*

<sup>43</sup> *Ira Holtzman, C.P.A. & Assocs., Ltd v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA "authorizes private litigation" so consumers "need not depend on the FCC").

<sup>44</sup> 42 U.S.C. § 7412(d).

<sup>45</sup> 42 U.S.C. § 7604(a).

<sup>46</sup> 42 U.S.C. § 7413(d).



**B. A waiver would violate the separation of powers, both with respect to the judiciary and Congress.**

The seminal separation-of-powers case is *United States v. Klein*,<sup>47</sup> involving a statute passed by Congress intended to undermine a series of presidential pardons issued during and after the Civil War to former members of the Confederacy. The statute directed the courts to treat the pardons as conclusive evidence of guilt in proceedings brought by such persons seeking compensation for the confiscation of private property by the government during the war, thereby justifying the seizure of their property.<sup>48</sup>

The Supreme Court held the statute violated the separation of powers by forcing a “rule of decision” on the judiciary that impermissibly directed findings and results in particular cases.<sup>49</sup> The Court held one branch of government cannot “prescribe a rule for the decision of a cause in a particular way” to the judicial branch and struck down the law.<sup>50</sup>

But dictating a “rule of decision” is precisely what the “waiver” requested seeks to accomplish. The goal, as the RadNet Entities do not deny, is to prevent the Central District Court and any other court from finding “a violation” of § 64.1200(a)(4)(iv). If the waiver is granted, the statute will remain the same. This regulation will remain the

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<sup>47</sup> 80 U.S. 128, 147–48, 13 Wall. 128, 20 L.Ed. 519 (1872).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 146.

<sup>50</sup> *Id.*

same. But the federal district court will be told it cannot find “a violation” of the regulation. That the Commission cannot do.

The RadNet Entities might argue that the court could still find a violation of the regulation after a waiver; it simply cannot award damages. That does not save such argument because then the “waiver” would abrogate Congress’s directive that when the “appropriate court” finds “a violation,” the private plaintiff is automatically entitled to a minimum of \$500 in statutory damages.<sup>51</sup> The Commission has no power to “waive” a statute.<sup>52</sup> From any angle, the Commission cannot encroach on the judiciary or Congress in the manner contemplated by the RadNet Entities, and it should deny their requested waiver.

Indeed, the United States District Court for the Western District of Michigan, in a private TCPA action wherein the defendant sought a waiver, just last December held “[i]t would be a fundamental violation of the separation of powers for [the Commission] to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”<sup>53</sup> The court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the regulation

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<sup>51</sup> § 227(b)(3).

<sup>52</sup> *In re Maricopa Community College Dist. Request for Experimental Authority to Relax Standards for Public Radio Underwriting Announcements on KJZZ(FM) and KBAQ(FM), Phoenix, Arizona*, FID Nos. 40095 & 40096, Mem. Op. & Order (rel. Nov. 24, 2014) (“The Commission’s power to waive its own Rules cannot confer upon it any authority to ignore a statute. While some portions of the Act contain specific language authorizing the Commission to waive provisions thereof, the Act grants no such authority with respect to Section 399B.23.”).

<sup>53</sup> *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-cv-0729, 2014 WL 7109630, at \*14 (W.D. Mich. Dec. 12, 2014).

itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether the defendant violated the “regulation prescribed under” the TCPA.<sup>54</sup> The court concluded that “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”<sup>55</sup>

Accordingly, the Commission should decline to issue a “waiver” to shield the RadNet Entities from private TCPA liability (as opposed to Commission enforcement). If the Commission decides to grant the RadNet Entities a “waiver,” it should expressly state that its effect is limited to Commission enforcement proceedings.

The decision in *Stryker* is fully supported by the D.C. Circuit Court of Appeals’ decision in *Natural Resources Defense Council v. EPA* (“*NRDC*”).<sup>56</sup> There the D.C. Circuit considered whether the EPA had authority to issue a regulation creating an affirmative defense to a private right of action for violations of emissions standards it issued pursuant to the Clean Air Act, in situations where such violations are caused by “unavoidable” malfunctions.<sup>57</sup> The court held the agency did not have such authority and struck the regulation down for three main reasons.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 749 F.3d 1055, 1062 (D.C. Cir. 2014).

<sup>57</sup> *NRDC*, 749 F.3d at 1062.

First, the court noted the statute grants “any person” the right to “commence a civil action” against any person for a “violation of” the EPA standards.<sup>58</sup> The statute states a federal district court presiding over such a lawsuit has jurisdiction “to enforce such an emission standard” and “to apply any appropriate civil penalties.”<sup>59</sup> To determine whether civil penalties are appropriate, the statute directs the courts to “take into consideration (in addition to such other factors as justice may require)” a number of factors, including “the size of the business, the economic impact of the penalty on the business, the violator’s full compliance history and good faith efforts to comply,” etc.<sup>60</sup>

Thus, the D.C. Circuit held, although the statute directs the EPA to issue regulations and “creates a private right of action” for their violation, “the Judiciary” “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action.”<sup>61</sup> The Clean Air Act was consistent with that principle, the court held, because it “clearly vests authority over private suits in the *courts*, not EPA.”<sup>62</sup> The court held that, by creating an affirmative defense to the statutory private right of action—as opposed to issuing the regulations to be enforced in those actions as directed by the statute—the EPA impermissibly attempted to dictate to the courts the

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<sup>58</sup> *Id.* at 1062–63.

<sup>59</sup> *Id.* at 1063.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, emphasis in original (quoting *City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

<sup>62</sup> *Id.*, emphasis added.

circumstances under which penalties are “appropriate.”<sup>63</sup> Therefore, the court struck down the regulation.<sup>64</sup>

Second, the D.C. Circuit noted that the EPA has dual enforcement authority over the Clean Air Act, which authorizes both private actions and agency actions to enforce the regulations.<sup>65</sup> It also noted the EPA has the power to “compromise, modify, or remit, with or without conditions, any administrative penalty” for a violation in those proceedings.<sup>66</sup> Under this dual-enforcement structure, the court held, “EPA’s ability to determine whether penalties should be assessed for Clean Air Act violations extends only to administrative penalties, not to civil penalties imposed by a court.”<sup>67</sup> The regulation creating an affirmative defense for “unavoidable” violations ran afoul of that principle.<sup>68</sup>

Third, the court noted that the Clean Air Act authorizes the EPA to intervene in private litigation.<sup>69</sup> Thus, the court held that “[t]o the extent that the Clean Air Act contemplates a role for EPA in private civil suits, it is only as an intervenor” or “as an

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* The statute also requires the private plaintiff to give notice to the EPA so the agency can decide whether to intervene. 42 U.S.C. § 7604(c)(3).

amicus curiae.”<sup>70</sup> An intervenor or amicus curiae has no power to create an affirmative defense in the actions in which it intervenes or submits its views, the court held.<sup>71</sup>

The reasoning of *NRDC* directly applies here. First, like the Clean Air Act, the TCPA creates a private right of action for “any person” to sue for violations of the regulations prescribed under the statute and directs the Commission to issue those regulations, but it vests the “appropriate court” with the power to determine whether “a violation” has occurred.<sup>72</sup> If the court finds a violation, the TCPA imposes automatic minimum statutory damages of \$500, but allows the court “in its discretion” to increase the damages.<sup>73</sup> The TCPA creates *no role* for the Commission in determining whether a violation has occurred, whether it was willful, or whether damages should be increased (and if so, in what amount). Instead, the TCPA “clearly vests authority over private suits in the *courts*,” not the Commission.<sup>74</sup> Issuing a “waiver” to prevent the Central District of California from determining that “a violation” occurred is no different than the EPA issuing an affirmative defense to prevent courts from determining that civil penalties are “appropriate” because a defendant’s violations were “unavoidable.”

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> § 227(b)(3).

<sup>73</sup> *Id.*

<sup>74</sup> *NRDC*, 749 F.3d at 1063, emphasis added.

Second, just as the Clean Air Act grants the EPA authority to enforce the regulations through administrative penalties, the Communications Act grants the Commission authority to determine whether penalties should be assessed for TCPA violations in forfeiture actions brought pursuant to 47 U.S.C. § 503(b). Like the EPA's attempt to dictate "whether penalties should be assessed" in private litigation, granting a "waiver" for the purpose of extinguishing the RadNet Entities' liability in private litigation would run afoul of the bifurcated dual-enforcement structure Congress has created. The Commission is free to choose not to enforce its regulations against the RadNet Entities, but it cannot make that choice for Simon or the putative class.

Third, the Commission has even *less* authority to grant a waiver than the EPA did to create an affirmative defense because the Clean Air Act at least allows the EPA to intervene in private actions. The TCPA allows the Commission to intervene only in actions brought by state governments to seek civil penalties for violations of the caller-identification requirements.<sup>75</sup> It creates no role for the Commission in private TCPA actions. If an agency with express authority to intervene in a private action enforcing its regulations lacks power to create an affirmative defense in that action, then an agency with no authority to intervene cannot grant an outright "waiver" of a defendant's liability. The Commission is limited to participating in private TCPA actions "as amicus curiae," as it often does.<sup>76</sup>

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<sup>75</sup> § 227(e)(6)(C).

<sup>76</sup> See, e.g., *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1284 (11th Cir. 2014)

*Footnote continued on next page*

In sum, in accordance with *NRDC*, the Commission could not create an affirmative defense of “confusion” or “misplaced confidence” that petitioners could then attempt to establish in court. If the Commission cannot do that, it cannot take the more radical step of simply “waiving” the violation.

**II. The RadNet Entities are not “similarly situated” to the petitioners covered by the Opt-Out Order.**

**A. The Petition does not identify which of the RadNet Entities, if any, sent faxes that are subject to the request for waiver.**

The RadNet Entities are not entitled to a waiver because they are not “similarly situated” to the petitioners covered by the Opt-Out Order. The Opt-Out Order provides that only similarly situated parties may seek waivers. For a party to be similarly situated, it must have sent fax ads. Here, the RadNet Entities do not even identify which of them, if any, sent faxes that are subject to their request for waiver. Instead, they merely present a list of 22 entities, wrap them up in the collective term “RadNet,”<sup>77</sup> and seek a blanket waiver. As such, they fail to meet their burden to show that they are “similarly situated.”

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(relying on FCC interpretation of TCPA fax rules in amicus letter submitted at court’s request).

<sup>77</sup> The RadNet Entities use the collective “RadNet” throughout the Petition, but at the same time use the singular “it.” This underscores their failure to identify who sent faxes that are subject of the request for waiver.



**B. Only three of the 22 RadNet Entities are defendants. The remaining 19 entities fail to show that they are subject to “potentially substantially damages.” The three defendants do not make this showing either.**

Simon has only sued three of the 22 RadNet Entities.<sup>78</sup> By definition the 19 non-defendant entities are not facing “potentially substantial damages” and are not therefore similarly situated to the petitioners covered by the Opt-Out Order. Moreover, the three RadNet Entities that are defendants also fail to show that they are similarly situated. All they do is point to Simon’s prayer for relief in his complaint stating that he is seeking damages of at least \$5 million.<sup>79</sup> This is merely a demand and does not indicate their exposure overall, or specifically their exposure for failing to provide out-out notices on faxes sent with prior express permission. Because they make no claim or showing in the Petition that they obtained any prior express permission, the exposure they face arises from sending *unsolicited* fax ads (including fax ads unprotected by any established business relationship because of the failure to provide any opt-out notices).<sup>80</sup>

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<sup>78</sup> There is no suggestion that there is other TCPA litigation pending against any of the other RadNet Entities.

<sup>79</sup> Petition 6.

<sup>80</sup> Likewise, we do not know from the Petition whether any RadNet Entity is insured (and the extent of such insurance). *Compare* to the Best Buy Petition referenced in n. 18, *supra*.

Because of the RadNet Entities' failure of proof, the Commission cannot determine that any of the RadNet Entities face damage exposure "substantial" enough to warrant a waiver.<sup>81</sup>

**C. The RadNet Entities did not obtain prior express permission from Simon or any other fax recipient.**

The RadNet Entities seek a waiver with respect to faxes sent with prior express permission, but their Petition does not even claim that any of them obtained any prior express permission (as that term is used in the TCPA and interpreted by the Commission) to send any faxes.<sup>82</sup> Instead, they merely claim that "[m]any...health care professionals have specifically requested to receive...information" via fax and faxes have been sent to fax numbers that the professionals have provided. As an example, the RadNet Entities claim that Simon provided his fax number in order to receive an MRI scan.<sup>83</sup>

But none of this possibly constitutes prior express permission. The Commission stresses that prior express permission "requires that the consumer understand that by providing a fax number, he or she is agreeing to receive faxed advertisements."<sup>84</sup>

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<sup>81</sup> See Opt-Out Order ¶ 27

<sup>82</sup> Simon objects on due process grounds to any attempt by the RadNet Entities to present any additional or different facts in any reply to these Comments. Simon requests that the Commission disregard any additional or different facts that the RadNet Entities may offer in its reply. At a minimum, the Commission should grant Simon the ability to respond to any such additional or different facts.

<sup>83</sup> As stated earlier, Simon disputes this allegation. See n. 28, *supra*.

<sup>84</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 F.C.C.R. 14014, 14129, ¶ 193 ("FCC 2003 Order"); see also *Jemiola v. XYZ Corp.*,  
*Footnote continued on next page*

Similarly, the Commission has ruled that providing a fax number on an application form gives prior express permission only if the form “include[s] a clear statement indicating that, by providing such fax number, the individual agrees to receive facsimile advertisements from that company or organization.”<sup>85</sup> Nowhere in their Petition do the RadNet Entities claim that anyone, including Simon, provided their fax number after agreeing to receive fax ads. Using their Simon “example,” permission given to receive a MRI scan by fax is not permission to receive advertisements by fax.<sup>86</sup>

The RadNet Entities cannot obtain a waiver of § 64.1200(a)(4)(iv) based on prior express permission when they do not claim and cannot possibly maintain, consistent with the TCPA and Commissions rules, that they sent any fax ads based on such permission. There is no legitimate reason to give a party a waiver when it does not and cannot even make a facial showing that it obtained prior express permission.<sup>87</sup> This separately

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802 N.E.2d 745, 748 (Ohio C.P. 2003) (“the recipient must be expressly told that the materials to be sent are advertising materials, and will be sent by fax.”)

<sup>85</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 21 F.C.C.R. 3781, 3807, ¶ 45 (“2006 Junk Fax Order”).

<sup>86</sup> The RadNet Defendants do not even assert prior express permission in their Answer in the Simon litigation. Instead of asserting prior express permission they invoke some generalized “doctrine of consent.” Zimmermann Decl., Ex. B, 3:27.

<sup>87</sup> It is one thing for the Commission to state in the Opt-Out Order, in the context of petitioners who could claim that they obtained prior express permission, that “[n]or should the granting of such waivers be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of recipients to be sent the faxes at issue...” Opt-Out Order ¶ 31. But it is an entirely different matter here, where the RadNet Entities do not claim and cannot maintain that they obtained any prior express permission.

precludes the RadNet Entities from contending that they are “similarly situated” and from obtaining any waiver.

**D. The RadNet Entities offer empty and meaningless conclusions about their “belief” concerning need to comply with §64.1200(a)(4)(iv) that, in any, do not satisfy the Opt-Out Order.**

The RadNet Entities are also dissimilar to the petitioners covered by the Opt-Out Order because their violations of § 64.1200(a)(4)(iv) did not result from the confusion and misplaced confidence required to be shown under the Opt-Out Order about the opt-out notice requirement. The Commission granted waivers because it determined that two specific grounds led to “confusion” or “misplaced confidence” by the covered petitioners about whether the opt-out requirement applied: the rulemaking for, and footnote 154 in, the 2006 Junk Fax Order.<sup>88</sup> The Commission found that these factors taken *together* justified a waiver.<sup>89</sup> The Commission cautioned, however, that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”<sup>90</sup> Thus, a party will only be similarly situated to the covered petitioners if it was confused about the opt-out requirement based on *both* of these grounds.

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<sup>88</sup> For example, the petitioners covered by the Opt-Out Order all made reference to the “confusing footnote language in the record.” Opt-Out Order ¶ 24.

<sup>89</sup> Opt-Out Order ¶ 28 (“Taken together, the inconsistent footnote in the *Junk Fax Order* and the lack of explicit notice in the *Junk Fax NPRM* militates in favor of a limited waiver in this instance.”).

<sup>90</sup> *Id.* at ¶ 26.

Here, the RadNet Entities never claim that they were confused on *either* of these two grounds. Moreover, they offer only empty conclusions in a vain attempt to show that they were similarly situated to the covered petitioners.

The RadNet Entities first claim that “RadNet did not believe that these solicited fax transmissions required opt-out notices.” This claim is facially ridiculous as it purports to cover *all 22 entities* in one fell swoop. Moreover, the RadNet Entities do not claim that their “belief” stemmed from the two sources of “confusion” or “misplaced confidence” identified in the Opt-Out Order (*i.e.*, the notice of rulemaking for, and footnote 154 of, the 2006 Junk Fax Order). In fact, they offer no explanation at all; they fail to state why they “did not believe” that faxes sent with prior express permission “required opt-out notices,” or how or when they arrived at this belief.

Later in the Petition, the RadNet Entities claim that they “reasonably believed that its transmission of solicited faxes was in compliance with the TCPA and Commission regulations.” But this statement suffers from the same failings as their earlier claim about their “belief.”

The RadNet Entities also state that they were “confused by conflicting language from the 2006 Junk Order.” This across-the-board statement covering 22 entities is likewise ridiculous. They fail to identify either the particular RadNet Entity, or the individual(s) within any entity, that were “confused,” when they became “confused,” or how they became “confused.” They do not even identify the “conflicting language” that supposedly caused the “confusion.” Further, they do not claim this alleged “confusion” actually led them to omit opt-out notices in their faxes.

At most, the RadNet Entities appear to be simply ignorant of the law, which the Commission ruled in the Opt-Out Order is insufficient for a waiver from § 64.1200(a)(4)(iv).<sup>91</sup> This separately bars their waiver request.

### **III. It would be contrary to public interest to grant the RadNet Entities a waiver.**

Although unnecessary to deny the RadNet Entities' Petition because they failed to carry their burden of demonstrating that they are "similarly situated," it would be against the public interest to grant the RadNet Entities any waiver. In the Opt-Out Order, the Commission recognized two competing public interests—on one hand, an interest in protecting parties from substantial damages if they violated the opt-out requirement due to confusion or misplaced confidence, and on the other hand "an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads."<sup>92</sup> The former does not apply here (including because, as discussed above, the RadNet Entities' failure to provide opt-out notices did

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<sup>91</sup> See Opt-Out Order ¶ 26. If for any reason the Commission finds the RadNet Entities were "confused" or had "misplaced confidence," Simon has a due process right to investigate the same. It has been denied discovery on this issue to date. See, e.g., *Applications of Comcast Corp. and Time Warner Cable Inc. For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57; *Applications of AT&T, Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Dissenting Statement of Commissioner Pai (arguing Commission violated petitioners' "due process rights" by denying "serious arguments that merit the Commission's thoughtful consideration"). The Commission may hold such "proceedings as it may deem necessary" for such purposes and may "subpoena witnesses and require the production of evidence" as the Commission determines "will best serve the purpose of such proceedings." See 47 C.F.R. § 1.1. In the alternative, Simon requests the Commission order that it will not rule on RadNet Entities' Petition until Simon has completed discovery regarding their knowledge (or lack thereof) of the statute and the Commission's regulations at the time it sent its fax ads. Discovery in the Simon litigation has just commenced.

<sup>92</sup> Opt-Out Order ¶ 27.

not result from confusion or misplaced confidence about the rulemaking of, or footnote 154 in, the 2006 Junk Fax Order), but the latter does.

In addition, the RadNet Entities claim that they sent faxes to “health care providers with whom [they have] done and [are] doing business,” and they invoke the established business relationship exemption.<sup>93</sup> This means, however, that the RadNet Entities were required to provide opt-out notices on their faxes in any event. In the Opt-Out Order, the Commission reiterated that a “waiver does not extend to the similar requirement to include an opt-out notice on fax ads sent pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to their faxes.”<sup>94</sup>

It would be against public policy (especially in light of the highly useful purposes served by opt-out notices as found by the Commission) to give the RadNet Entities a waiver of liability for sending faxes with no opt-out notices whatsoever when they were required to provide opt-out notices in all events because their faxes were sent to persons with whom they had established business relationships. The RadNet Entities cannot claim any confusion or misplaced confidence about the need to provide opt-out notices on their faxes in the first place.

### **Conclusion**

The Commission should deny this Petition for waiver because the Commission has no authority to “waive” a regulation in a private right of action under the TCPA. Doing

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<sup>93</sup> As indicated earlier, the RadNet Defendants specifically invoke the established business relationship exemption in the Simon litigation. *See* n. 29, *supra*.

<sup>94</sup> Opt-Out Order ¶ 2, n. 2; *see also* ¶ 29.



so would encroach on the judiciary's power to determine whether "a violation" of a regulation has taken place and Congress's power to impose statutory damages for "each such violation." The RadNet Entities also are not "similarly situated" to the petitioners covered by the Opt-Out Order including because (1) they do not identify which of them, if any, sent faxes that are subject to the request for waiver (or the specifics of such faxing); (2) neither the three RadNet Entities that are defendants in the Simon litigation nor the 19 non-defendant RadNet Entities can show that they are subject to "potentially substantial damages;" (3) the RadNet Entities do not claim and cannot maintain, consistent with the TCPA and Commission rules, that they sent fax ads with prior express permission; and (4) while the RadNet Entities make assertions about their "belief" and "understandings" about the need to comply with § 64.1200(a)(4)(iv), they are devoid of any substance and are meaningless conclusions that are simply insufficient to warrant a waiver of liability.

Moreover, it would be against public policy to waive the RadNet Entities' liability for violating § 64.1200(a)(4)(iv) because they were required to provide opt-out notices on their faxes in all events.

Dated: February 13, 2015

Respectfully submitted,

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